

No. _____

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

T & R TRUCKING, INC.,
a West Virginia Corporation,

Appellant,
Plaintiff-below,

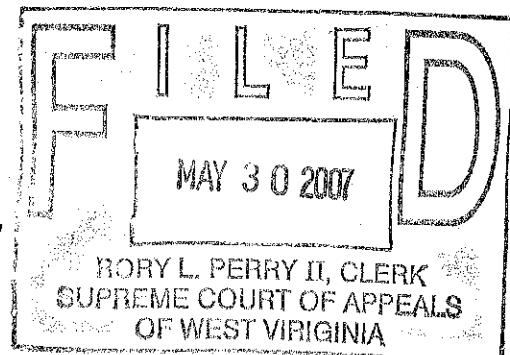
v

Docket No. -
Civil Action No. - 02-C-226

RICK MAYNARD,

Appellee,
Defendant and
Third-Party Plaintiff-below,

v




THOMAS BENTON FARLEY, JR., individually,
and in his official capacity as President of
T & R Trucking, Inc., a West Virginia Corporation

Appellant,
Third-Party Defendants-below.

BRIEF ON BEHALF OF THE APPELLEE, RICK MAYNARD

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BRIEF ON BEHALF OF THE APPELLEE, RICK MAYNARD

**I. KIND OF PROCEEDING AND NATURE OF THE
RULING IN THE LOWER TRIBUNAL**

The initial complaint in this matter alleged a breach of contract and suit was filed by the appellant, T & R Trucking, Inc., against the appellee, Rick Maynard. The appellee, Rick Maynard, filed counterclaims against T & R Trucking, Inc., and a third party complaint against the appellant, Thomas Benton Farley, Jr., individually and in his official capacity as President of T & R Trucking Co., Inc., a West Virginia

Corporation for breach of contract, outrageous and intentional conduct, fraud, failure to act in good faith and fair dealing, and intentional interference with business.

After extensive discovery, the issues in this case were submitted to a jury on August 3, 2006. A jury answered specific interrogatories in the Jury Verdict Form that (1) Rick Maynard did not breach the lease purchase agreement; (2) Thomas Benton Farley, Jr., in his official capacity as President of T & R Trucking, Inc. breached the lease purchase agreement and awarded damages in the amount of Sixty-Four Thousand Twenty-Nine Dollars and Forty Cents (\$64,029.40); and (3) Thomas Benton Farley, Jr., individually breached the lease purchase agreement and awarded damages in the amount of Thirty-Six Thousand Dollars (\$36,000.00).

For clarification, the style of this matter was changed by Order of the Court to correctly identify the third party defendant below as Thomas Benton Farley, Jr., instead of Thomas Benjamin Farley, Jr.

The trial court made the following rulings in the lower tribunal.

- A. The trial court ruled that the driver's license status of Rick Maynard was not relevant in that the complaint of the petitioner alleged breach of contract for failure to make timely monthly payments pursuant to the lease purchase agreement. Moreover, the trial court ruled pursuant to 403 of the W. Va. Rules of Evidence that the probative value of the status of the appellee's drivers' license was substantially outweighed by the prejudicial effect of said evidence.
- B. The trial court ruled that the issue of whether Thomas Benton Farley, Jr., should be individually liable should be decided by the jury.
- C. The trial court ruled that the jury verdict form was proper.

II. STATEMENT OF THE FACTS OF THE CASE

In March, 2001, the appellee and third party plaintiff, Rick Maynard, became a subcontractor for T & R Trucking, Inc. to do **off road coal hauling**. Rick Maynard

formed his own corporation Shephard's Trucking, March, 2001, the parties entered into a contract or lease purchase agreement whereby Rick Maynard would purchase a certain 1999 Western Star Truck by making monthly payments of Two Thousand Eight Hundred Seventy Five Dollars (\$2,875.00) beginning in April 2001. Mr. Maynard had hired his own drivers to drive the off road coal truck while working as a subcontractor. Mr. Maynard had between two (2) to three (3) drivers. The following testimony was given by Rick Maynard:

Q. So you already had how many employees?

A. At the ending time I had two. Sometimes I would have three. It was according to what type of shift I was running as far as drivers goes. (Trial Transcript hereinafter Tr. at p. 220)

Rick Maynard was required to pay twenty-five (25) total payments with the final payment due in April, 2003. On February 22, 2002 the parties validated the contract in writing. The crux of the case at bar is whether the signed lease purchase agreement (a contract) was breached and, if so, which party breached that agreement.

The records of Financial Federal Credit (the lienholder) were admitted into evidence by stipulation. Based on an affidavit signed by the President of T & R Trucking, Inc., (Thomas Benton Farley, Jr.) the coal truck which is the subject of the lease purchase agreement (Contract) was designated as an "off the highway vehicle".

As stated in the lease purchase agreement, Mr. Maynard made his Two Thousand Eight Hundred Seventy Five Dollars (\$2,875.00) monthly payments from April, 2001 through and including February, 2002. After February, 2002, Thomas Benton Farley, Jr. disappeared in that his office was closed and no one knew his whereabouts. Rick Maynard was unable to pay Mr. Farley because he could not find him and the office of T & R Trucking Inc., was closed. Moreover, Thomas Benton Farley, Jr. never returned phone calls.

In April, 2002, Financial Federal Credit contacted Rick Maynard and informed him that the truck was to be repossessed due to Thomas Benton Farley, Jr.'s, failure to make payments on the truck. Rick Maynard made several telephone calls to Thomas Benton Farley, Jr., trying to locate him. Three of those calls were recorded on an answering machine and played to the jury.

With no options available to him, Mr. Maynard, surrendered the vehicle by leaving it on the secured premises of Triad Mining in Lenore, West Virginia. Specifically, Mr. Maynard stated, **"After he called me, I had to get my drivers out of the truck and park the truck"**. (Tr. p. 213) This is the location that Mr. Maynard was working at the time. Mr. Maynard left a telephone message with Mr. Farley that Financial Federal Credit wanted the truck. A few days later, Thomas Benton Farley, Jr., telephoned Mr. Maynard and stated the vehicle was vandalized.

Subsequently, T & R Trucking, Inc. filed a complaint against Rick Maynard alleging breach of contract for the failure of Rick Maynard to make monthly installments of Two Thousand Eight Hundred Seventy-Five Dollars (\$2,875.00). Mr. Maynard filed a counterclaim against T & R Trucking, Inc. and a third party complaint against Thomas Benton Farley, Jr. individually and in his official capacity as President of T & R Trucking, Inc., a West Virginia Corporation for breach of contract, outrageous and intentional conduct, fraud, failure to act in good faith and fair dealing, and intentional interference with business.

**A. THE BRIEF OF THE APPELLANTS STATES
NUMEROUS INACCURACIES**

The appellee asserts that there are numerous inaccuracies in the appellants' statement of facts.

1. APPELLEE'S DRIVER'S LICENSE STATUS WAS PROPERLY EXCLUDED BY THE TRIAL COURT AS NOT RELEVANT AND THAT ANY PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE PREJUDICIAL EFFECT UNDER THE WEST VIRGINIA RULES OF EVIDENCE 402, 403 AND 404.

Appellants incorrectly assert that Mr. Maynard's driver's license was a determinative issue in whether there was a breach of contract. When the appellant, Thomas Benton Farley, Jr., filed his complaint against the Appellee Rick Maynard, he alleged that Rick Maynard breached the lease purchase agreement between them by failing to make timely payments.

There are no allegations regarding a driver's license in the complaint. Further, there are no terms in the lease purchase agreement regarding a driver's license. The terms of the lease purchase agreement provided the following:

THIS AGREEMENT, made this 22nd day of February, 2002, between T & R TRUCKING, INC., hereinafter called the "Seller," party of the first part, and RICK MAYNARD, hereinafter called the "Buyer," party of the second part.

WITNESSETH

1. The Seller, T & R Trucking, Inc., in consideration of the covenants herein contained on the part of the Buyer, hereby agrees and covenants to lease, transfer, and assign all right, title and interest, free and clear of all liens and encumbrances, to the Buyer, Rick Maynard, upon the prompt and full performance by said Buyer of the terms of this Agreement, the following-described personal property:

**One (1) – 1999 WESTERN STAR TEN-WHEELER
VIN #2WLTCCCJ7XK957659**

2. The Buyer, in consideration of the premises, covenants with the Seller as follows:

(a) To pay to T & R Trucking, Inc., the balance due on the Seller's installment Contract, as and for the purchase price of said vehicle the said balance, to be paid as follows: In equal monthly installments of \$2,875.00, for a total period of twenty-five months; The first of the said payments of \$2,875.00 was made April 16, 2001, and

monthly payments have been made since that time. That the monthly payments shall continue each month with the final payment being due April, 2003;

(b) The said Buyer shall be leasing the truck until such time as all the payments are made, at which time the Seller shall convey title to the truck to said Buyer;

3. The Seller covenants with the Buyer as follows: (a) That he, the Seller, warrants that he owns said vehicle and has the right to sell it.

(b) The Seller agrees that the Buyer is to have immediate possession of said vehicle.

It is understood and agreed by and between the parties hereto that in the event the Buyer fails to perform and keep his promises and agreements hereunder in making payments upon the said agreed price, or in the performance or observance of any of the covenants herein contained on the part of the Buyer, the said Seller, at his option, may cause the whole amount due under this agreement to become immediately due and payable, or at his option may declare the Lease to be forfeited, null and void, and retain the amount paid thereunder as rent; the said Seller shall so notify said Buyer of his action by Notice of Default mailed to the said Buyer at:

RT. #1 BOX #1546-A, WAYNE, WV 25570

It is further agreed that the Buyer has a 60-day default period before the Seller can foreclose for non-performance of this Agreement, time being of the essence herein.

In the event the said Seller chooses to declare the Agreement forfeited, null and void, thirty (30) days after said mailing of the said Notice of Default, the Seller shall record in the Office of the Clerk of County Commission of Wayne County, West Virginia, an Affidavit stating the facts of forfeiture, and the facts of mailing the Notice of Default, and all the right, title, and interest of the Buyer in and to the subject vehicle shall immediately cease, and this Lease agreement shall be terminated and all interest in said vehicle shall be vested in the Seller.

The said parties to this instrument hereby bind themselves, their executors, administrators, heirs and assigns to the performance of this Agreement.

It is mutually agreed by and between the parties hereto that no assignment of this Lease shall be made by the Buyer without the written consent of the Seller.

Additionally, the appellant, Thomas Benton Farley, Jr., was specifically asked during his discovery deposition whether he had any other complaints against Rick Maynard other than the failure to make timely payments and his response was no.

Q. (By Mrs. Henderson-Staples) Mr. Farley, I just have a couple more questions. The lease purchase agreement that you signed with Mr. Maynard, for him to purchase your truck, other than the payments he was to make to you, **are you alleging that Mr. Maynard in any way violated that contract in any other way other than making payments to you?**

A. **I mean, other than not making the payments, that's it.**

(Deposition of Thomas Benton Farley, Jr., taken August 4, 2004, pg. 91 and pg. 92).

The appellee, Rick Maynard, was not employed by the appellant during the term of the lease purchase agreement. Rick Maynard had his own off road coal hauling business called Shepherd's Trucking. Noteworthy is the fact that **Rick Maynard employed his own drivers in his off road coal hauling business. Simply put, Mr. Maynard had his own corporation with his own drivers.** (Tr. p. 200)

2. APPELLANTS INCORRECTLY RECITE FACTS NOT SUPPORTED BY THE RECORD

The Brief is replete with facts which are not supported by the record. Those facts include, but are not limited to, the following:

(a) The brief assert T & R Trucking, Inc., would not have employed the appellee, Rick Maynard to drive; however, the employment of the appellee, Rick Maynard as a driver for T & R Trucking, Inc. was never a factual issue in this matter. Rick Maynard was not employed by T & R Trucking, Inc., when the lease purchase agreement was entered because Rick Maynard had formed his own corporation, Shepherd's Trucking, and was working as an independent contractor.

(b) The appellants assert that T & R Trucking, Inc., defaulted when the appellee, Rick Maynard defaulted in making his payments; however, the stipulated financial records clearly indicate that T & R Trucking, Inc., was always in default during the contract period and T & R Trucking, Inc. defaulted first by failing to make payments to Financial Federal Credit. Further, the lease agreement signed by the appellant Thomas Benton Farley, Jr., and the appellee, Rick Maynard states that Mr. Maynard had made all of his payments from April, 2001 through and including February, 2002.

(c) The appellants assert that they complied with the Notice of Default provisions contained on the lease purchase agreement; however, appellant Thomas Benton Farley, Jr. testified that he had no knowledge as to whether a Notice of Default was sent to the Appellee, Rick Maynard:

MR. HURT: We would move this into evidence as Plaintiff's Exhibit No. 4.

THE COURT: Plaintiff's Exhibit No. 4, any objection?

MR. STAPLES: Judge, I would like to voir dire him on the exhibit.

THE COURT: You may do that.

MR. STAPLES: With regards to this letter, Mr. Farley, it's dated May 7, 2002, did you type this letter up?

A: No, sir.

Q: Did you see it typed up?

A: I don't recall. You are talking back to May of 2002?

Q: So you don't know whether you ever saw it typed up back in May of 2002?

A: No. I know it got done. Which attorney done it, I don't know. I can't answer that.

Q: **My question was: Did you see it back in May of 2002?**

A: No.

Q: Did you mail this letter to Rick Maynard, this May 7, 2002 letter? You yourself?

A: Myself, no, I did not.

Q: Did someone in your office back in May of 2002 mail this letter to Rick Maynard?

- A: You are asking me to speculate. You wouldn't let me do it a minute ago. I can't answer that.
- Q: So you don't know?
- A: I don't know.
- Q: **That's all I want you to say is you don't know. So as far as you know you never saw the letter. You don't know whether it was mailed; correct?**
- A: That is correct.
- Q: You don't know who wrote it up, do you?
- A: No, I don't.
- Q: I would object to it.

(Tr. pgs. 62 and 63)

(d) The appellants assert that the appellee's allegations that he couldn't make the February, 2002 payment because the appellant, Thomas Benton Farley, Jr., could not be found was incorrect; however, the appellant, Thomas Benton Farley, Jr., testified that he lived in numerous places:

- Q. Where were you living? In direct examination you said you were living in Chapmanville in 2002.
- A. I had an address in Chapmanville, and I was in Virginia and in Kentucky working. (See Trial Transcript, hereinafter Tr. at pg. 99)

...

- Q: Back in 2004 I asked you specifically where you lived. Could you turn to Page 45, Line 12.
- A: It says no. I'm looking on 44. Chapmanville.
- Q: Let's go down to Line 15. When we asked you when did you move from Chapmanville, what did you answer?
- A: It says November of 2000 but that is not Correct.
- Q: So, at that time you said you moved from Chapmanville in November of 2000; correct?
- A: I think later on over it states that I messed up on the dates.
- Q: I asked you when did you move. Let's go to Page 45, Line 20.
- A: Okay.
- Q: The questions was, "Where did you move then"? How did you answer?
- A: I said I went to Wytheville, Virginia.

Q. It said you moved to Wytheville, Virginia, in November of 2000? (Tr., page 100)

...

Q. I'm going to get there. Page 46, Line 5 – questions and I'm on Line 3, "When did you leave Wytheville? Your answer was what?

A. It says 2001.

Q. Your answer was May; correct?

A. Yes, that is correct?

Q. I said of 2001 and you say it may be 2002; right?

A. It had to be.

Q. But when I kept guessing you on Page 47, Lines 10 through 13, the question was, I will read it. **"So you were in Florida from May of 2001 to approximately June or July"? You answered what?**

A. I said I answered **"June"** but I said "the year is wrong".

Q. I just need for you to tell me how you answered, sir.

A. June.

Q. And the questions was June of 2004, **from May of 2001 to June of 2004; is this correct? What did you say?**

A. **I said June of 2004 is correct.**

Q. How did you answer, sir?

A. **I said June of 2004 –**

Q. Line 15.

THE COURT: Let him answer.

MR. STAPLES: I'm sorry. Line 15. I just want him to read it.

THE WITNESS: I said, yes, ma'am. (Tr., pg. 102)

Therefore, the appellant had previously stated under oath that he resided in Florida from May, 2001 through June, 2004. Also, Financial Federal Credit was unable to find the appellant.

Q. Wasn't Financial Federal looking for you?

A. I have the paperwork on Financial Federal.

Q. The question was, were they looking for you?

A. They sent me a letter January of '03, yes.

Q. They sent you more than one letter. **They sent you letters that came back because they couldn't find you; right?**

A. Yeah. It went to a post office box and I wasn't there to sign for them. (Tr., pg. 103)

Other contractors, including Sharon Amburgry, were trying to locate Thomas Benton Farley, Jr., in March, April and May, 2002. Mr. Farley appeared to be intentionally avoiding these contractors and simply refused to return any telephone calls or otherwise respond to various messages. Again, the following testimony was presented by Sharon Amburgry:

- Q. Were you ever paid in full by T & R Trucking?
A. My last two weeks we never got paid on that.
Q. When would that have been that they were due?
A. It was three – I don't know if it was the first or second.
It was in March. It was like the second week of March, 3/15 to like the end of March.
Q. 2002?
A. 2002, yeah.
Q. Did you ever attempt to find Mr. Farley?
A. Yes.
Q. What efforts did you make to find Mr. Farley?
A. When we found out that he lost the haul up there, he told us that – he kept telling us it wasn't going to be. He wasn't going to lose the haul. He did lose it. I would go to the office. I would call his home. Just – you couldn't find him.
Q. Did you leave messages for him?
A. Oh, yes.
Q. Did he ever return your calls?
A. No.
Q. Did you speak to anyone else about Mr. Farley's whereabouts?
A. No. Just the drivers and stuff up there. They said he was out there every once in a while but it was just hard to catch him.
Q. So you did go to his workplace?
A. Yes.
Q. Several times?
A. Yes.
Q. He wasn't to be found?
A. No.
Q. You called his home?
A. Yeah. (Tr. pgs. 262, 263).

...

- Q. Did you ask for his physical address?
A. No. I couldn't find him up at Pen Coal. So I knew I probably wouldn't be able to find him at home. **I had cell phone and home phone numbers for him, but he never returned phone calls.** (Tr., pg. 264, 265).

It is obvious that the appellant, Thomas Benton Farley, Jr., could not be found and appeared to be avoiding all his subcontractor and other business obligations.

(e) The appellant, Thomas Benton Farley, Jr. asserts that Gary Pace of Financial Federal Credit contacted him and agreed to let T & R Trucking, Inc., catch up with the payments in arrears; however, Gary Pace never testified at the trial. No one from Financial Federal Credit testified that they had an agreement with appellant, Thomas Benton Farley, Jr. Furthermore, there was no written documentation supporting petitioner's claim that there was an agreement to pay whenever he could.

(f) The appellant's assert that "after Maynard defaulted in making his payments, T & R Trucking, Inc. was not able to timely make payments to Financial Federal Credit". However, the appellant, Thomas Benton Farley, Jr., testified that Rick Maynard had made all of his payments except September 2001:

- Q. **Now, you testified in your direct examination today that you thought the only payment that Mr. Maynard didn't made was September of 2001, am I correct?**
A. **That is correct. Up to February.**
Q. Up until February?
A. Yes.
Q. The last time we had you under oath did you tell us, sir, that May of 2001 wasn't paid?
A. We found everything that it was paid. You all found the – we found the documentation that it was paid.
Q. Did you tell us it wasn't?
A. That is correct?
Q. Did you also tell us that he hadn't paid in August of 2001?
A. That's back whenever it was a bad check, yes. It was all straightened up also.

- Q. So you told us he hadn't paid, but he had paid; correct?
- A. That is correct.
- Q. You also told us that in February of 2002 he hadn't paid, didn't you?
- A. That is correct.
- Q. But he had paid?
- A. We found the checks, yes. (Tr. pgs. 97 and 98).

Then, the appellant, Thomas Benton Farley, Jr., agreed that Rick Maynard had also made his September payment:

- Q. This is the haul sheet for August. But he made the payment for September after he got paid for working in August. That is why it's called the September payment.
- A. Okay. (Tr., pg. 126)

(g) The appellants incorrectly assert that the appellee called and left messages that he was three months behind; however, the tape recorded messages over a period of time were heard by the jury and stated as follows:

TRANSCRIPT OF ANSWERING MACHINE TAPE

FIRST CALL

Yea, Benny, this is Rick Maynard. I was wanting to talk to you about when I could bring you a truck payment. Give me a call if you don't care 272-3904

SECOND CALL

Yea, Benny, this is Rick Maynard. I just got off the phone with the finance company guy and he said that truck they are looking for – you might want to get in touch with – said four months behind. I know I am soon to be three months myself but I was trying to get a hold of you there last week to give you one but you know we need to get together on this and with that finance company get something worked out here. 304-272-3904. I'll see ya.

THIRD CALL

Yea, Benny, this is Rick Maynard. The finance company called me and told me that you wasn't keeping up your payments, they are coming after it, that they was coming after it so I left the key in it and it's sitting up there. Better do something with it. Bye.

(h) The appellants assert that the appellee, Rick Maynard abandoned the truck; however, there was not a scintilla of evidence that the truck had been abandoned by Rick Maynard.

(i) The appellants assert that the appellee, Rick Maynard may have removed parts and damaged the truck; however, there was not a scintilla of evidence that Rick Maynard had removed parts and damaged the truck.

(j) Amazingly, the appellants assert that the reason Rick Maynard parked the truck at TRIAD Mining at this time was because he was going to prison by the Court's Order of May 15, 2002 for driving drunk on a revoked license. There is not one scintilla of evidence of this and it appears that this absurd statement is intended only to mislead this Court.

(k) The appellants assert that another primary reason why Maynard parked the truck on the TRIAD Mining property was because he defaulted in the payment to the insurance company. There was not a scintilla of evidence to support this assertion.

(l) The appellants state that the defendant lost his driving privileges due to alcoholism. There is not a scintilla of evidence that Rick Maynard suffered from alcoholism.

3. **EVEN THOUGH THE APPELLEE, RICK MAYNARD
MADE HIS MONTHLY PAYMENTS, THOMAS BENTON
FARLEY, JR., WAS ALWAYS BEHIND ON HIS PAYMENTS
TO FINANCIAL FEDERAL CREDIT.**

The following trial testimony was elicited from Thomas Benton Farley, Jr.
which establishes that Mr. Farley was routinely three (3) month behind on his
payments to the finance company.

- Q. It is true, sir, that you had a payment due on April 3rd
of 2001 according to Financial Federal's records?
- A. Okay.
- Q. The payment that you had due in April 3rd, 2001,
when did you make that payment?
- A. June 12th.
- Q. Of what year?
- A. '01.
- Q. So at least a cou^{pl}e of months behind; is that
right?
- A. Yes.
- Q. Did you tell the jury that you made your payments on
time?
- A. I said as he made the payments to me, I made them
to Financial Federal.
- Q. So was he late in April of '01 in making a
payment? He meaning Rick Maynard.
- A. No.
- Q. But you were?
- A. Yes. (Tr. pg. 108)

...

- Q. Payment was due on October 3, 2001. When did
you make it?
- A. January 2nd.
- Q. So it's true in October you were at least three
months and eight days behind?
- A. Okay.
- Q. That three month - you stayed behind about
three months, two or three months; all the way
from October up to February; is that correct?
- A. Yes, that is correct. (Tr., pg. 110)

4. **APPELLANTS ROUTINELY WROTE BAD CHECKS
WHICH CAUSED OTHER CONTRACTORS TO SUFFER**

Another subcontractor, Sharon Amburgry, testified that she was the owner of four (4) coal trucks and did coal hauls for T & R Trucking, Inc. during the relevant time frame. (See Tr. at pgs. 260-264). Ms. Amburgry testified that Thomas Benton Farley, Jr. routinely wrote her "bad checks" and wrote her one bad check in the amount of Twenty-Four Thousand Dollars (\$24,000.00)

The following testimony was elicited from Ms. Amburgry.

- Q. Did there ever come a time that he failed to pay you for your haulage?
A. Yes.
Q. Could you explain that to the jury?
A. We had to wait all the time for our pay. We were supposed to get paid every week, every two weeks. Sometimes we would wait three and four weeks. **I had a couple of checks bounce.** So I started getting cashier's checks from him. I had drivers to pay and bills to pay and I couldn't afford to get bounced checks.
Q. Did he ever give you a check for \$24,000 that bounced?
A. Yes. (Tr. p. 261)

Accordingly, the Appellee avers that there are numerous factual discrepancies alleged in the Petition For Appeal.

III. **RESPONSE TO ASSIGNMENTS OF ERROR AND RULING BELOW**

- A. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUBMIT EVIDENCE OF THE LACK OF GOOD FAITH ON THE PART OF RICK MAYNARD IN FAILING TO DISCLOSE THAT HE DID NOT HAVE A DRIVER'S LICENSE AND A COAL MINE TRUCK DRIVER'S CERTIFICATE IN THAT SAID EVIDENCE WAS PROPERLY EXCLUDED UNDER RULE 401, 402, 403 AND 404 OF THE WEST VIRGINIA RULES OF EVIDENCE.

- B. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION TO DISMISS THE THIRD PARTY DEFENDANT, THOMAS BENTON FARLEY, JR., INDIVIDUALLY, IN THAT THERE WAS DIRECT EVIDENCE THAT THOMAS BENTON FARLEY, JR., PARTICIPATED IN WRONGFUL ACTS OF HIS CORPORATION, T & R TRUCKING CO., INC.
- C. THE TRIAL COURT CORRECTLY SUBMITTED THE JURY VERDICT FORM TO THE JURY WHEN THE APPELLANT'S FAILED TO OBJECT TO SAID JURY VERDICT FORM.

IV. POINTS, AUTHORITIES AND DISCUSSION

- A. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION TO SUBMIT EVIDENCE OF THE LACK OF GOOD FAITH ON THE PART OF DEFENDANT, RICK MAYNARD, IN FAILING TO DISCLOSE THAT HE DID NOT HAVE A DRIVER'S LICENSE AND A COAL MINE TRUCK DRIVER'S CERTIFICATE IN THAT SAID EVIDENCE WAS PROPERLY EXCLUDED UNDER RULE 401, 402, 403 AND 404 OF THE WEST VIRGINIA RULES OF EVIDENCE.

I

STANDARD OF REVIEW FOR FIRST ASSIGNMENT OF ERROR

The court's decision to exclude evidence of Rick Maynard's driver's license and criminal record was discretionary. Pursuant to W. Va. R. Evid. 104(a), the court's decision regarding the admissibility of evidence is within the broad discretion of the trial court and will not be disturbed in the absence of an abuse of discretion. Akers v. Bd. Of Educ., 589 S. E. 2d 221 (W. Va. 2003), Craddock v. Watson, 475 S.E. 2d 62 (W. Va. 1996).

Herein, evidence of a driver's license does not help to prove whether Rick Maynard failed to make a timely payment under the lease purchase agreement or abandoned the truck.

2

**RULING BY TRIAL COURT REGARDING EXCLUDING
EVIDENCE OF MAYNARD'S DRIVERS LICENSE AND
COAL TRUCK DRIVERS' CERTIFICATION.**

The initial question presented is whether evidence that the Appellee Rick Maynard did not have a valid driver's license or possess a coal truck driver's certification should have been submitted to the jury when the complaint filed by the appellant alleged breached of contract for failure to make timely monthly installments under the terms of a lease purchase agreement.

Rule 402 of the West Virginia Rules of Evidence states as follows:

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals. *Evidence which is not relevant is not admissible.*" (Emphasis Supplied).

Moreover, this rule was also considered by the trial court in light of Rule 403 of the West Virginia Rules of Evidence. Rule 403 states,

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (West Virginia Rules of Evidence 403)

Rule 403 and Rule 402 of the West Virginia Rules of Evidence are specifically designed to direct the trial judge to exclude evidence whose probative value is

substantially outweighed by the danger of unfair prejudice. (See Collins v. Bennett, 486 S.E.2d 793 (W. Va. 1997).

Prior to the jury trial, the Trial Court had heard arguments of counsel, read memorandums of law and consistently ruled on **four (4) separate occasions** that the status of Rick Maynard's driver's license was irrelevant to the issue before the jury, to wit; breach of contract for failure to make payments and abandonment of the vehicle.

- (1) By Order entered April 29, 2005, the Court ruled "... that the prejudicial effect of allowing evidence of Rick Maynard's driving record and criminal record substantially outweighs any probative value."
- (2) By Order entered October 12, 2005 the court denied the plaintiff's motion for summary judgment which was based on Rick Maynard's driver's license and good faith.
- (3) By Order entered July 13, 2006 the Court denied the plaintiff's motion for summary judgment and motion in limine with reference to Rick Maynard's driver's license and good faith;
- (4) Prior to the trial of August 3, 2006, the Court denied plaintiff's motion in limine with reference to Rick Maynard's driver's license and good faith; and, further explained the basis for his ruling.

Moreover, the Court considered this evidence in light of Rule 404 of the West Virginia Rules of Evidence. Rule 404 (b), in pertinent part, states,

"(b) Other crimes, wrongs, or acts. – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." (West Virginia Rules of Evidence 404)

The following excerpt outlines the court's analysis in excluding the evidence of the driving record of Rick Maynard:

THE COURT: Okay. Well again I had the benefit of having all of this information from the testimony in previous trial and the fact of the matter is this is not a case involving the employment issue. It's a breach. **There was never any evidence that I'm aware of that Mr. Farley indicated that once he found out that he didn't have a driver's license that's when he decided he was going to stop this contract. That wasn't it. His position is that Mr. Maynard breached the contract by just paying on the truck and just parking the truck. It has nothing to do with the driver's license. It has nothing to do with whether he was certified to operate a truck on that property or not.**

Again under 404(b) I think not being material to the issue of the breach. I think it would be prejudicial to put into the fact that Mr. Maynard lost his operator's license for some type of a criminal conviction. I think that prejudicial effect far exceeds any probative value it might have with regard to whether either party breached its contract or not. Because it wasn't claimed as a part of the breach was that he lost his license and couldn't drive. It was the fact that he didn't pay on the truck.

MR. STAPLES: Judge, can I just say something along those same lines?

THE COURT: Yes.

MR. STAPLES: Based on the records that are already admitted in this case that was stipulated from Financial Federal Credit there is an affidavit from Tom Farley, who was the president of his corporation, it's an owners affidavit as to the operation of an off the highway vehicle. That truck was clearly designated as an off the highway vehicle. That affidavit is already – it's signed by Tom Farley, president, at the time –

THE COURT: I know that was an issue early on because I felt that this was off the public way. But Mr. Hurt was adamant about the fact that a lot of these roads on this property were old country roads. Which in my opinion didn't really make a difference. We're not talking about whether Rick Maynard had the ability to perform his duties. The fact is that he didn't pay for the truck. That's what the claim of the breach was. Not that he wasn't qualified to enter into the contract to begin with. I don't think it is relevant to the issues that are relevant to the cause of action in this case. That is why I have decided it should not be admitted.

So also – it has been a proffer of evidence that has been filed by affidavit presented by Mr. Farley showing what the testimony would be if it is permitted. That has been made a part of the court file. But my ruling stands. (Tr., pgs. 13-15.)

Accordingly, the trial court considered the evidence of the status of the driver's license and appellants' good faith argument. The court properly excluded said evidence under Rules 402, 403 and 404 of the West Virginia Rules of Evidence. Said exclusion of this evidence is discretionary and there was not an abuse of discretion.

B. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION TO DISMISS THE THIRD PARTY DEFENDANT, THOMAS BENTLEY FARLEY, JR., INDIVIDUALLY IN THAT THERE WAS DIRECT EVIDENCE THAT THOMAS BENTON FARLEY, JR., PARTICIPATED IN WRONGFUL ACTIONS OF HIS CORPORATION, T & R TRUCKING CO., INC.

I

STANDARD OF REVIEW FOR SECOND ASSIGNMENT OF ERROR

Questions of fact are for jury determination and where the jury has made a finding based upon credible evidence, the jury verdict will not be disturbed unless the jury verdict is clearly wrong or manifestly against the weight of the evidence. Ashland Oil, Inc. v. Donahue, 264 S.E.2d 466 (W. Va. 1980), Toler v. Hager, 519 S.E.2d 166 (W. Va. 1999), and Nesbitt v. Flaccus, 138 S.E. 2d 859 (W. Va. 1964).

Whether there is sufficient evidence to support a jury verdict, the court should (1) consider evidence most favorable to the prevailing party; (2) assume all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to

the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved. Graham v. Wallace, 538 S.E.2d 730 (W. Va. 2000).

II

THE JURY PROPERLY DETERMINED THAT THOMAS BENTON FARLEY, JR., INDIVIDUALLY PARTICIPATED IN WRONGFUL ACT OF HIS CORPORATION

The appellants assert "that there had been no evidence whatsoever during the trial of this case that he (Thomas Benton Farley, Jr.), acted in any manner other than as an officer of the plaintiff, T & R Trucking Co., Inc."

West Virginia jurisprudence is not dictated by whether an individual acted in his official capacity. Rather, the issue is whether an officer of the corporation has sanctioned or participated in the wrongful acts. Cato v. Silling, 73 S.E. 2d 731, 745 (W. Va. 1952), cert. denied 348 U.S. 981 (1955), Mullins v. Venable, 297 S.E. 2d 866 (W. Va. 1982), Bowling v. Ansted Chrysler – Plymouth – Dodge, Inc., 425 S. E. 2d 144 (W. Va. 1992).

In Bowling, supra, the court specifically held that "an officer of a corporation may be personally liable for the tortious acts of the corporation, including fraud, if the officer, participated in, approved of, sanctioned, or ratified such acts." In Bowling, twenty-one (21) plaintiffs filed civil actions against a dealership and its president. The gravamen of their case was that the president had misrepresented newer vehicles as factory cars when, in fact, they were used rental cars. The jury heard significant evidence on the manner in which the vehicles were misrepresented. Therein, the court held that "A review of the record leads us to conclude that there was sufficient direct and circumstantial evidence present from which a reasonable jury could have concluded that Mr. Akers (the dealership's president) sanctioned and participated in the fraudulent scheme."

The court cited the general rule followed in other jurisdictions as instructive in West Virginia:

An officer of a corporation is personally liable for wrongful actions of that corporation if he approved or sanctioned the action. He is liable if he is personally guilty of making false representations as to material matters in connection with the Corporation's actions. Bowling, supra, citing State ex rel. Stephan v. Commemorative Services Corp., 16 Kan. App. 2d 389, 400, 823 P. 2d 831, 840 (1991).

In the case at bar, the jury heard substantial evidence regarding the contractual relationship between Rick Maynard and T. & R. Trucking, Inc. and its president, Thomas Benton Farley, Jr., including, but not limited to, the following:

- (1) That Thomas Benton Farley, Jr., entered into the contract with Rick Maynard and signed same;
- (2) That Thomas Benton Farley, Jr., represented in the contract that Rick Maynard had made all of his payments at the time the contract was signed;
- (3) That Thomas Benton Farley, Jr., personally received the checks from Rick Maynard;
- (4) That Thomas Benton Farley, Jr., **falsely represented to Rick Maynard that he made timely payments to the lending institution, Financial Federal Credit;**
- (5) That Thomas Benton Farley, Jr., failed to make timely payments to the lending institution;
- (6) That Thomas Benton Farley, Jr., was consistently behind in his payments to the lending institution, sometimes as much as three (3) months;
- (7) That Thomas Benton Farley, Jr., had failed to pay the West Virginia annual corporation fees and caused the corporation to be in a revoked status during the contractual period and during a substantial part of the discovery in this case;
- (8) That Thomas Benton Farley, Jr., had written bad checks to other individuals and businesses during the same time;

- (9) That Thomas Benton Farley, Jr., had written bad checks for as much as Twenty Four Thousand Dollars (\$24,000.00);
- (10) That other individuals and businesses were unable to locate Thomas Benton Farley, Jr., to conduct and/or complete business during the contractual period in question and specifically in March, April and May, 2002; and,
- (11) That Thomas Benton Farley, Jr., wrote a bad check to Rick Maynard in the amount of eleven thousand dollars (\$11,000.00).

Hence, the jury had sufficient direct and circumstantial evidence to conclude that Thomas Benton Farley, Jr. sanctioned and participated in the breach of the contract herein; therefore, he could be held individually liable.

Without question, West Virginia jurisprudence recognizes individual liability of a corporate officer, both civilly and criminally. In Mullins v. Venable, 297 S.E. 2d 866, 868 (W. Va. 1982), the court ruled that a corporate officer can be held individually liable for violating the Wage Payment and Collection Act because **"corporate officers have a duty to see that their corporation obeys the law."** See also State v. Childers, 415 S.E. 201 460 (W. Va. 1992) wherein the court held that "Officers, agents, and directors of a corporation may be criminally liable if they cause the corporation to violate the criminal law while conducting corporate business.

As a matter of fact, the plaintiff and third party defendant, Rick Maynard, had filed a motion in limine requesting that felony bad check charges filed against Thomas Benton Farley, Jr., be admitted into evidence, however the court ruled that the prejudicial affect of allowing the evidence outweighed the probative value.

The following argument was presented regarding the actions of Thomas Benton Farley, Jr., in participating in the wrongdoing in breaking this contract.

THE COURT: What was the evidence of what his actions were that were beyond the scope of the corporation?

MR. STAPLES: The Court had ruled and we had argued that his actions were – to the extent that **it hinged on fraud**

in the sense that he made representations of Mr. Farley that he was sending Mr. Maynard's check into the lienholder. That was not occurring based on the evidence of record. That there were accounts that were not in the name of the corporation. They were in his individual name. There was evidence on that factually.

THE COURT: Bank accounts?

MR. STAPLES: Yes, bank accounts. I can't remember the -- the one specific account that I had cross examined him extensively about where he had over \$200,000 at times where he had made the representation that he didn't have money and that was the reason why he couldn't make these payments. Actually during that time period he had monies in the bank accounts that were in his name, not in the corporate name, of over \$200,000 and some dollars repeatedly for months.

Also there was evidence, Judge, that not only was he not sending in the payments that he was making representations that he was sending in the payments. There was evidence that for months over end he was just pocketing the payments that were being made for at least three months without ever sending in a payment. It's our position that all of those actions occurred as him acting as an individual.

(See transcript dated September 19, 2006 at pgs. 15 & 16)

The appellants allege that counsel for Rick Maynard improperly stated in closing argument that since T & R Trucking, Inc. was defunct when the actions of Thomas Benton Farley, Jr., occurred, then he was personally liable. However, a trial court's admission of improper evidence may be harmless error if the content of that testimony is clearly established by other evidence. Rubenstein v. Metropolitan Life Insurance Co., 118 W. Va. 367, 190 S.E. 831 (1937). Graham v. Wallace 588 S. E. 2d 167 (W. Va. 2003). Furthermore, the court instructed the jury that argument of counsel was not evidence and should not be considered as evidence. (Tr. p. 302, Lines 4-8). Clearly, the jury heard a plethora of evidence which supports the fact that Thomas Benton Farley, Jr., was individually liable for his wrongful acts. (See also Torrence v. Kusminsky, 408 S.E.2d 684 (W. Va. 1991))

The jury considered an overwhelming of evidence regarding the actions and inactions of Thomas Benton Farley, Jr. It was within the province of the jury to assess the evidence and apportion liability against Thomas Benton Farley, Jr. individually and T & R Trucking, Inc.

C. THE TRIAL COURT CORRECTLY SUBMITTED THE JURY VERDICT FORM TO THE JURY WHEN APPELLANTS FAILED TO OBJECT TO SAID JURY VERDICT FORM

The next question to be addressed is whether the appellants can allege, for the first time, after the verdict is rendered, that they object to the jury verdict form. In other words, did the appellants waive their objection to the verdict form when they failed to object.

Since counsel for the Appellants never objected to the Jury Interrogatory Form, any objection to its form is waived. Rule 46 of the West Virginia Rules of Civil Procedure states: "the objection to evidence must be timely made and specific in order to give the trial court an opportunity to address the issue at a time when corrective action may be taken." Coleman v. Sopher, 499 S.E.2d 592 (W. Va. 1997). Moreover, "Absent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury's discharge, constitutes a waiver of the defect or irregularity in the verdict form." Syl. Pt. 2 Combs v. Hahn, 205 W. Va. 102, 516 S.E.2d 506 (1999).

The Trial Court specifically asked each party whether they had any objections to the jury verdict form.

THE COURT: Does anybody see any problems with the original verdict form that we used?

MS. HENDERSON-STAPLES: We don't have a problem with it, Judge. Do you have a clean copy?

MR. HURT: I don't have a copy of it. I'm sure that I don't have an objection to it.

MS. HENDERSON-STAPLES: It was yours.
THE COURT: Give each party a copy.

Thereafter, the parties argued the appellant's motion to dismiss Thomas Farley individually. The court denied said motion and instructed the parties that he was going to prepare a separate interrogatory for Thomas B. Farley, Jr.

THE COURT: I tell you what I'm going to do I'm going to deny the motion. I'm going to make a separate interrogatory to the jury. Because our last verdict form had Thomas B. Farley, Jr., individually, and in his official capacity as president of T&R Trucking. I believe it would be more appropriate to have a separate interrogatory to the jury that deals with Thomas B. Farley, individually. So, I will modify that.

MS. HENDERSON-STAPLES: Judge, you mean adding a third interrogatory?

THE COURT: Yes.

MS. HENDERSON-STAPLES: So on No. 2 would that stay the same?

THE COURT: No. It will say T&R Trucking, Incorporated.

MS. HENDERSON-STAPLES: Okay.

THE COURT: Then we will have a third one that basically reads the same way with the exception of having Thomas B. Farley, Jr., individually. So I'm going to deny the motion to dismiss. I do think it would be appropriate though that there be a separate place on the verdict form for the jurors to consider Mr. Farley's individual culpability if they chose to as opposed to having to lump him in with T&R Trucking. (See transcript dated August 3, 2006 at pgs. 295-296)

Appellant's counsel made NO OBJECTION. Prior to the jury returning to the courtroom for the instruction and jury verdict form, the Court gave all counsel a copy of the new jury verdict form: NO OBJECTION WAS MADE BY APPELLANT'S COUNSEL.

To further demonstrate that all parties were given a copy of the jury verdict form the appellee's counsel showed the jury verdict form to the jury during closing argument and explained it to the jury. The following is an excerpt from closing argument of appellee's counsel:

MR. STAPLES: The Judge is going to give you a lot of exhibits to take back. One of the most important things he will give you will be a jury verdict form. It says Interrogatory to the Jury. You will going to have to answer questions when you go back there. One the first page of that document they are going to ask you **as to the claim of T&R Trucking against Rick Maynard, do you find that Rick Maynard breached the lease purchase agreement?** The answer to the first page should be no. Then you will turn over. There is another question **as to the counterclaim of Rick Maynard.** This is on the second page although the pages are not numbered. **Do you find as to the counterclaim filed by Rick Maynard against Thomas B. Farley and official capacity as president of T&R Trucking do you find that Tomas Farley as president of T&R Trucking breached the lease purchase agreement?** The answer is yes.

Why is that so? Because when he became reinstated and you render – when I say he, I'm talking about T&R Trucking, when he became reinstated and comes in here as a corporation, he is liable now to Mr. Maynard. So, yes, as T&R Trucking he is liable. The question is did he breach the agreement on the second page and it would be yes. The damage amount goes here. The foreperson signs it after you-all agree.

There is going to be a third question on there. **Is he individually liable?** The answer is yes again.

(See transcript dated August 3, 2006 at pgs. 326-328)

Any suggestion that the parties did not get a copy of the jury verdict form that the jury took to the jury room simply is not accurate and is misleading.

The Court is explaining the jury verdict form.

THE COURT: When you have deliberated and you've arrived at a verdict, you will take the verdict form and you will answer the questions. On these Jury No. 1, 2 and 3. I think they are self explanatory. If you answer yes on any of them, it's required that you establish some damages with regard to the blank that has a dollar sign beside it. If you answer no to any of the interrogatories, you have actually ruled against the claim. You can do that in all three of them. I ask that the foreperson will date and sign all three pages of this verdict form.

(See transcript dated August 3, 2006 at pg. 338)

This Honorable Court recently ruled in State ex rel. Valley Radiology, Inc. v. Gaughan, 220 W. Va. 73, 640 S. E. 2d 136 (2006) that if there is a defect in the jury verdict form such as how the form is drafted or the way the jury answers the form the attorney must object to the defect before the jury is discharged or the defects are waived. In syllabus point 3 this Court reiterated its previous ruling that the objections are waived.

3. "Absent extenuating circumstances, the failure to timely object to a defect or irregularity in the verdict form when the jury returns the verdict and prior to the jury's discharged, constitutes a wavier of the defect or irregularity in the verdict form." Syl. Pt. 2, Combs v. Hahn, 205 W. Va. 102, 516 S.E.2d 506 (1999).

It is obviously clear that counsel for the appellants filed to object to the jury verdict form prior to the jury being discharged and therefore he waived any objection.

V. CONCLUSION

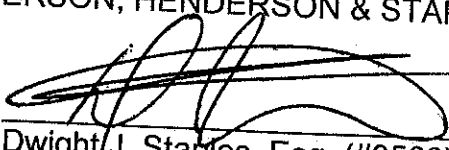
The appellee, Rick Maynard, urges this Court that all the parties have had their day in Court. After four (4) years of expensive and extensive litigation, the jury has resolved the issues and there is no error. The appellee represents that the jury verdict should be affirmed and this Honorable Court should deny the relief sought by the appellants.

RICK MAYNARD

BY COUNSEL

HENDERSON, HENDERSON & STAPLES, LC

By:


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304.523.5732

IN THE SUPREME COURT OF APPEALS OF
THE STATE OF WEST VIRGINIA

T & R TRUCKING, INC.,
a West Virginia Corporation,

Appellant,
Plaintiff-below,

Docket No. -
Civil Action No. - 02-C-226

v

RICK MAYNARD,

Appellee,
Defendant and
Third-Party Plaintiff-below,

v

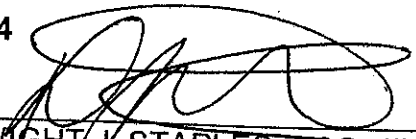
THOMAS BENTON FARLEY, JR., individually,
and in his official capacity as President of
T & R Trucking, Inc., a West Virginia Corporation

Appellant,
Third-Party Defendants-below.

CERTIFICATE OF SERVICE

I, Gail Henderson-Staples, counsel for the appellee, Rick Maynard, hereby
certify that I served a copy of the foregoing "BRIEF ON BEHALF OF THE
APPELLEE, RICK MAYNARD" by depositing a true and correct copy thereof in the
United States mail, postage prepaid on this 30th day of May, 2007, upon the following:

Charles E. Hurt, Esq.
1671 Woodvale Drive
Charleston, WV 25314


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